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Federal Communications Commission  
Office of Secretary

November 28, 1997

**Via Federal Express**

Mr. William Caton  
Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: In the Matter of: Preemption of State and Local Zoning  
and Land Use Restrictions on the Siting, Placement and  
Construction of Broadcast Station Transmission  
Facilities  
MM Docket No. 97-182, FCC 97-296

Dear Mr. Caton:

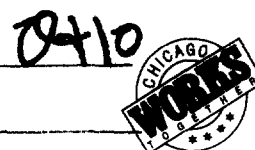
Enclosed please find for filing an original and nine (9) copies of the Reply Comments of the City of Chicago in this matter. Please arrange for distribution of five of the copies to the Commissioners. I have enclosed an extra copy of the City's Comments to be file stamped and returned to the City's representative.

Very truly yours,

Christopher Torem  
Assistant Corporation Counsel



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Federal Communications Commission  
Office of Secretary

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of: )  
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Preemption of State and Local )  
Zoning and Land Use Restriction )  
on the Siting, Placement and )  
Construction of Broadcast )  
Station Transmission Facilities )

MM Docket No. 97-182

REPLY COMMENTS OF THE CITY OF CHICAGO

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REPLY COMMENTS OF THE CITY OF CHICAGO

The City of Chicago has filed its initial comments in this matter ("City of Chicago Comments") during the initial comment period ending October 30, 1997. The City concurs with many of the comments filed by municipalities and airport operators. The City disagrees with the views expressed by members of the broadcasting industry and wishes to make the following additional remarks in this matter in the form of reply comments.

1. Aesthetic Considerations Are Important and Should Not Be Disregarded As Irrelevant As The NAB Would Prefer.

The NAB in its Comments would prefer that no aesthetic concerns be permitted in a local government evaluation of siting. "After all", the NAB states, "what to one person is an engineering marvel may be an eyesore to another." NAB Comments at 14. Moreover, says the NAB, the broadcasters in their application to the Commission for construction permits and license must address certain environmental concerns, including historic structures, endangered species, wetlands and Indian religious sites. The Courts take a different view, however. Cities have long been permitted to regulate structures in order to enhance local

aesthetics despite the subjectivity inherent. See Members of City Council v. Taxpayers For Vincent, 466 U.S. 789, 805 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981); Berman v. Parker, 348 U.S. 26, 33 (1954). Zoning and planning have long addressed the aesthetic issues raised by large structures such as HDTV Towers. It would be extraordinary to conclude that these enormous towers would constitute the only instance in which the power of local government to preserve and enhance the cityscape is eliminated.

2. The State Broadcasters Association's Proposed Amendments Are Even Harsher Than The NAB Rule And Should Be Rejected.

Certain named State Broadcasters Associations (collectively the "SBAS") have submitted comments and proposed amendments (the "SBAS Comments") to the Proposed NAB Rule included in the NPRM. The SBAS Comments urge the Commission to amend the Proposed NAB Rule to ensure that no action of local government related to broadcast siting can escape Commission intervention. To this end, the SBAS have proposed that any "action or order", as well as rules, laws and regulations which denies, delays the disposition of or conditionally grants a request for a television tower siting triggers the preemptive process. SBAS Comments, at ¶¶ 14, 16. The SBAS comments would also narrow the scope of permissible local regulation that would be presumptively acceptable to those regulations which, regardless of the health or safety objective, did not frustrate federal interests in the construction of broadcast transmission facilities. SBAS Comments, Exhibit A at ¶

(b)(2). SBAS has rationalized this further invasion of local jurisdiction on the grounds that "the Commission, not the local governing body, is the appropriate authority to determine the proper balance between federal and local interests." SBAS Comments at ¶ 17. Of course, in the absence of congressional delegation of preemptive power to the Commission, the law grants it no power to reexamine the policy choices of local government.

The extraordinarily broad expansion by the SBAS Comments of the already sweeping standards for preemption set forth in the Proposed NAB Rule would mean that virtually any decision of local government could trigger Commission intervention through the alternative dispute mechanism or the declaratory relief provisions of the Proposed NAB Rule, even if the decision were favorable but subject to reasonable conditions, such as safety. Additionally, SBAS Comments would require that the failure of state and local governments to act within the already accelerated time frames set forth in the Proposed NAB Rule would mean that the siting request was granted for "all purposes." SBAS Comments, at Exhibit A, ¶(a). This suggests that broadcasting towers would not be limited by building codes, safety codes, police powers or any other of the traditional powers of the affected local governments. Without belaboring the legal arguments already rendered during the initial comment period for the NPRM, there is no legal authority for such a draconian eradication of local government jurisdiction. From a

policy perspective, the SBAS comments would make it virtually impossible for local governments to protect the public.

The SBAS Comments also expand the areas in which local governments are preempted to cover additional categories of concerns, including a number of which are not necessarily subject to federal law. Included in this category are significant changes in surface features (such as wetland fills, deforestation or water diversion). The effect of the SBA Comments is to compromise state and local environmental protections without any indication that Congress intended such preemption.

3. The Scarcity of Television Tower Construction Crews is Not An Adequate Reason for Preempting Local Land Use Procedures.

A number of the broadcasters have stated in their comments that given the scarcity of skilled tower construction crews, delays and expense caused by local government review "may well have a deleterious effect on the timely provision of DTV and the early implementation of broadcast service generally". See NAB Comments at 9. Local government, however, did not create this scarcity nor the ambitious schedule for HDTV roll-out set forth in the Fifth Report and Order. That schedule was based in turn on the assumption that the facilities to be assembled for HDTV in its initial phase would be "minimal." Fifth Report at ¶91 and ¶92. The City disagrees that there is any correlation between local government review and delays caused by scarcity of needed tower construction personnel. The City would further submit that, if

anything, the scarcity of trained crews would argue against the necessity of preemption because any time spent by a broadcaster to complete the local land use process would also in all likelihood be time spent also waiting for the availability of proper construction personnel.

Respectfully submitted,

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